BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GARY L. HAYNES	)	
Claimant	)	
	)	
VS.	)	
	)	
MORTON BUILDINGS, INC.	)	
Respondent	)	Docket No. 1,049,244
	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the November 22, 2010, Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on March 8, 2011. Michael L. Snider, of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of his employment with respondent on August 8, 2009. The ALJ found that equal weight should be given to the functional rating opinions of Dr. Pedro Murati and Dr. Paul Stein and held that claimant had a 7.5 percent functional disability. The ALJ further concluded that claimant was entitled to a work disability and found he had a 100 percent wage loss. The ALJ again found that equal weight should be given to the task loss opinions of Drs. Murati and Stein and concluded that claimant was entitled to a 45 percent task loss. The 100 percent wage loss and 45 percent task loss computes to a 72.5 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award, other than Stipulation No. 1, which mistakenly indicates that claimant was injured in Sedgwick County, Kansas. According to the record, claimant's accident occurred in Cowley County, Kansas.

ISSUES

Respondent argues that claimant failed to satisfy his burden of proving he suffered personal injury by accident that arose out of and in the course of his employment. Respondent contends claimant's incident at work on August 8, 2009, was a natural and probable consequence of a preexisting back problem. In the event the Board finds that claimant proved a compensable injury, the respondent asks the Board to find that Dr. Stein's functional impairment rating opinion is more credible than the rating opinion of Dr. Murati and modify the Award to find that claimant has only a 5 percent functional impairment to the whole body. Respondent also argues that claimant had no increased disability over that which he had before his alleged work accident and should be denied work disability benefits based on the statutes within the Workers Compensation Act. Further, respondent argues claimant's task loss was not caused by his alleged work-related injury but was the result of his longstanding history of low back problems. Respondent also contends there is a statutory requirement, under K.S.A. 2009 Supp. 44-501(c), for a nexus between an employee's wage loss and the injury. Respondent asks the Board to determine that claimant's wage loss was not a product of his accidental injury and, therefore, find that work disability is not recoverable.

Claimant asserts he has proven he suffered an accidental injury that arose out of and in the course of his employment that resulted in permanent impairment. Claimant argues he had no preexisting disability and his present disability is attributable to the August 8, 2009, work-related injury. Claimant also contends the ALJ correctly found he had a 100 percent wage loss and that the ALJ correctly followed the statutory mandate in K.S.A. 44-515(e) when he considered both task loss opinions of Drs. Murati and Stein in holding that claimant had a task loss of 45 percent. Claimant asks that the Award of the ALJ be affirmed in its entirety.

The issues for the Board's review are:

(1) Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?

(2) If so, did claimant suffer any permanent disability as a result of the accidental injury? What the nature and extent of claimant's functional disability?

(3) Does claimant have to prove a nexus between his wage loss and his injury?

(4) Was claimant's loss of ability to perform certain tasks he had performed in the 15-year period before August 8, 2009, caused by the alleged work-related injury or was it a natural and probable consequence of his preexisting back condition?

FINDINGS OF FACT

Claimant began working for respondent in September 1999 as a steel handler, a job that included lifting, carrying and loading steel onto trailers. During that time, he sustained several work-related accidents. In 2000, claimant had a back problem when he was picking up some steel. He went to see a chiropractor where "[t]hey just popped me back in place"[1] and he went back to work.

In 2001, claimant was lifting some doors that weighed from 75 to 80 pounds when he heard his back pop. Claimant was initially seen by Dr. Jerry Mangen, a chiropractor, and then by Dr. Brian Davis, a family practitioner. He was later referred by respondent to an orthopedic physician, Dr. Doug Burton. Claimant had complaints of low back pain with numbness in the right thigh and was diagnosed with lumbar strain by Dr. Burton. On April 19, 2001, claimant was released from treatment and was told he could return on an as-needed basis. Dr. Burton's medical note of April 19, 2001, stated:

> I have also discussed with him that it would be wise to develop a long term plan of shifting into a line of work that was not quite so heavy for him. We know that it is unlikely that anyone is able to sustain this heavy work for a full career and he may last another 10-20, or even 25 years, but lasting another full 30 years is probably unlikely.[2]

Claimant was off work for a year after his 2001 injury and returned some time in 2002. In September 2004, claimant was again injured while he was sweeping and picking up some dirt at work. He turned wrong and had immediate onset of low back pain. He was treated by Dr. Mangen, and was returned to work with no restrictions. In May 2007, claimant was pulling steel, felt a pop, and fell to his knees in back pain. Claimant stated, "I do that all the time when I am pulling steel."[3]

In the incident involved in this docketed claim, claimant was helping his foreman, Dean Fatout, carry some guttering that weighed about 150 pounds on August 8, 2009. Claimant and Mr. Fatout had walked about two feet when claimant's back buckled. He fell to the floor and screamed. Claimant's supervisor, Daryl Quick, tried to get an appointment for claimant with Dr. Winblad but could not get him in until the next day. Claimant went to the appointment with Dr. Winblad, and x-rays were taken and an appointment was made for him to have an MRI. Claimant was eventually sent to Dr. Gerard Librodo, who assigned claimant a 20-pound lifting restriction. Dr. Librodo twice offered claimant epidural steroid injections for his low back, but claimant refused that treatment. Claimant was sent to physical therapy but said it did not help.

---

[1] R.H. Trans. at 38.

[2] Murati Depo., Ex. 3 at 2.

[3] R.H. Trans. at 43.

Claimant was put on light duty at work for six months. In February 2010, he was placed on medical leave of absence that was to end May 5, 2010. However, when respondent received a medical report from Dr. Paul Stein in April 2010, claimant was asked to return to work. Claimant reported to work on April 19, 2010, and was sent with a coworker to pick up boards and put them on a forklift. After performing that activity for 2 to 2 1/2 hours, claimant's right leg started to hurt, his foot went numb, and his back started popping and hurting. He reported this to his supervisor, Mr. Quick, and also spoke with Timothy Wetterhus, respondent's plant manager. Mr. Wetterhus sent him home to relax his back and told him to come back the next day.

Claimant testified that he woke up April 20 and was still having pain in his back. He said he was unable to get out of bed, and he called in to work and talked to Mr. Quick. Mr. Quick did not testify, but Mr. Wetterhus testified that Mr. Quick told claimant that because he had no more sick leave or vacation leave, the absence from work on April 20 would be designated as an unexcused absence. Mr. Wetterhus also testified that Mr. Quick told claimant he would have to bring in a doctor's note saying he could not come to work. Claimant never brought in such a doctor's note. Claimant denied he was told he needed to bring in a doctor's note. Mr. Wetterhus also testified that claimant did not call in to work on either April 21 or April 22, but claimant testified he called in both days. Claimant was terminated on April 23, 2010,

Dr. Paul Stein, a board certified neurosurgeon, examined claimant on March 8, 2010, at the request of respondent. He reviewed medical records from Dr. Librodo and the actual films of an MRI scan done September 18, 2009. The MRI showed mild drying out of the L3-4 disc consistent with claimant's age. There was a mild decrease in the height of the disc space at L2-3 and a little curvature reversal. Dr. Stein noted these were relatively mild findings; and there was no distinct pathology: no disc herniation and no evidence of impingement on nerve roots at any level. Dr. Stein also reviewed the results of a nerve conduction study ordered by Dr. Librado and performed by Dr. Rizwan Hassan on November 6, 2009. Dr. Stein noted that Dr. Hassan said the EMG findings were suggestive of a mild degree of chronic right L5 radiculopathy. But Dr. Stein opined the EMG was not abnormal enough to find radiculopathy based on the AMA *Guides*.[4] Dr. Stein said there were no positive sharp waves, no fibrillations, and no vesiculations and, in his opinion, the EMG results were not diagnostic of radiculopathy.

Claimant's main complaint at the examination was back and right leg pain. In the physical examination, Dr. Stein found no neurological deficit. Claimant had some mild tenderness on palpation of the lower back in the midline and some restriction in range of motion of the low back. Dr. Stein concluded that claimant had a back strain. He recommended some specific x-rays to be sure there was no instability in the low back and also said it would be helpful to have the records of claimant's previous 2001 back injury. The

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

recommended x-rays were done and reviewed by him on April 7, 2010. Dr. Stein said the x-rays showed no instability in claimant's low back.

Using the AMA *Guides*, Dr. Stein found claimant was in DRE Lumbosacral Category II, which carries a 5 percent whole person impairment. He said he considered placing claimant in Category III because of the EMG report, but then concluded the findings did not measure up to a diagnostic finding of radiculopathy but only was suggestive of radiculopathy. Claimant had no evidence of nerve root compression, so Dr. Stein concluded he was in Category II.

Dr. Stein initially thought it was likely that claimant's impairment was related to his 2001 injury. But subsequent to Dr. Stein's examination of claimant, respondent's attorney sent him copies of medical records concerning claimant's previous low back injuries. After reviewing those records, Dr. Stein did not find that claimant had a preexisting functional impairment to his low back and assessed claimant's entire 5 percent impairment to his current work injury. Dr. Stein, however, did not find any evidence of structural injury to the lower back or structural pathology such as to require permanent work restrictions. Dr. Stein believed that claimant had a back strain or sprain. But Dr. Stein found no physical examination findings of significance, no MRI findings, and no findings of nerve root irritation or pressure. Dr. Stein said the only positive thing claimant had was a history of a specific incident and some subjective reduction of lumbar range of motion, which was enough to put him in Category II of the AMA *Guides* but did not show Dr. Stein that claimant would put his back at risk by doing heavy work any more now than it was before the injury.

Dr. Stein reviewed a task list prepared by Steve Benjamin. Dr. Stein testified that since he provided no restrictions, there would be no task that claimant could not perform from a medical basis. Therefore, it was his opinion that claimant had a 0 percent task loss.

Dr. Pedro Murati is board certified in electrodiagnostic medicine and is a board certified independent medical examiner. He examined claimant on April 14, 2010, at the request of claimant's attorney. Claimant's chief complaints to Dr. Murati were low back pain off and on, constant right leg pain, and difficulty lying on his right side. Claimant gave Dr. Murati a history of his current injury and medical treatment, as well as a history of his back injury in 2001. Dr. Murati opined that claimant had no impairment as a result of his 2001 back injury based on the fact that claimant had a normal physical examination, no back complaints, and no restrictions.

After examining claimant, Dr. Murati diagnosed him with low back pain with signs and symptoms of radiculopathy. Based on the AMA *Guides*, he found claimant to be in DRE Lumbosacral Category III for a 10 percent permanent partial impairment to the whole body.

Dr. Murati said that although claimant's NCT/EMG test performed November 6, 2009, was incomplete, it still showed that claimant had chronic lumbosacral radiculopathy. The EMG study on claimant showed increased polyphasics with an irregular pattern, decreased recruitment pattern, and changes in the amplitudes and the duration of the motor unit

potentials, which Dr. Murati said is what the test would show if the radiculopathy is chronic. He said that positive sharp waves and fibrillations occur only in the acute phase, not when the radiculopathy is chronic. He testified that the electrodiagnostic evidence in this case shows unequivocally that claimant has radiculopathy. Dr. Murati opined that the radiculopathy resulted from the August 2009 injury and each day worked thereafter. He said there was no evidence that claimant had radiculopathy before his latest injury. Further, Dr. Murati believes the EMG study suggests that claimant's radiculopathy is bilateral.

Dr. Murati recommended permanent restrictions for claimant, stating that claimant's injury is chronic in nature and he would suffer if he did not follow the restrictions. Dr. Murati stated that in an 8-hour day, claimant should do no crawling; he should not lift, carry, push or pull greater than 20 pounds; he should rarely bend, crouch or stoop; he should only occasionally sit, use stairs or ladders, squat or drive; he could frequently stand and walk. Dr. Murati also said claimant could occasionally lift, carry, push or pull up to 20 pounds and frequently lift, carry, push or pull up to 10 pounds. Also, he should alternate sitting, standing and walking. Dr. Murati opined that if claimant returned to work and was required to do repetitive bending and twisting with his lower spine, that would likely exacerbate his symptoms.

Dr. Murati reviewed a task list prepared by Doug Lindahl. Out of the 23 tasks Dr. Murati believed were on the list, he opined that claimant was unable to perform 20 in a safe manner. This calculates to an 86.9 percent task loss.[5]

Doug Lindahl, a vocational rehabilitation counselor, met with claimant on June 3, 2010, at the request of claimant's attorney. Mr. Lindahl prepared a list of 22 tasks that claimant had performed in the 15-year period before his work related accident. At the time Mr. Lindahl saw claimant, claimant was looking for work and was on unemployment. Mr. Lindahl opined that claimant would be able to return to work at only minimum wage or slightly above based solely on Dr. Murati's restrictions. Dr. Stein's opinion that claimant needed no restrictions would not affect claimant's ability to earn what he had previously.

Steve Benjamin, a vocational rehabilitation consultant, met with claimant on July 23, 2010, at the request of respondent. He prepared a list of 37 tasks that claimant performed in the 15-year period before his accident. Claimant was unemployed at the time of the interview. Mr. Benjamin said that in reference to Dr. Stein's opinion, claimant should be able to return to work at the respondent and earn a comparable wage. In reference to the restrictions of Dr. Murati, however, claimant would not be able to return to his time-of-injury position but could reenter the open labor market to earn $403.04 per week, which is an average of the median wages for five positions Mr. Benjamin believed claimant could perform within Dr. Murati's restrictions. Mr. Benjamin's report provides a representative list of jobs he believed claimant could perform in the labor market area.

---

[5] Actually there were 22 tasks on the list, and Dr. Murati opined that claimant could no longer perform 19, for an 86 percent task loss.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[6] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[7]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[8]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[9] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[10] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is

---

[6] K.S.A. 2010 Supp. 44-501(a).

[7] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[8] *Id.* at 278.

[9] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

shown to have been produced by an independent intervening cause.[11] K.S.A. 2009 Supp. 44-501(c) states in part: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability."

K.S.A. 44-510e states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-515(e) states:

> Any health care provider's opinion, whether the provider is a treating health care provider or is an examining health care provider, regarding a claimant's need for medical treatment, inability to work, prognosis, diagnosis and disability rating shall be considered and given appropriate weight by the trier of fact together with consideration of all other evidence.

In *Tyler*,[12] the Kansas Court of Appeals stated: "Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement."

---

[11] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[12] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

In *Osborn*,[13] the Court of Appeals reversed the Board's imputing of a post-injury wage where it was determined the claimant failed to make a good-faith job search. Respondent argued the case was factually distinguishable from *Bergstrom*[14] because the claimant in *Bergstrom* was directed to stop working by a physician whereas the claimant in *Osborn* voluntarily quit an accommodated job. Further, the respondent argued there must be a causal connection between the wage loss and the injury. The Court of Appeals rejected both arguments, noting there is nothing in K.S.A. 44-510e that permits the factfinder to impute a wage. Citing *Bergstrom* and *Tyler*, the Court of Appeals reiterated that there is no requirement for a claimant to prove a causal connection between the injury and the job loss.[15]

ANALYSIS

Respondent contends that the *Bergstrom* and *Tyler* decisions are contrary to public policy and to the legislative intent of the Workers Compensation Act. Respondent further argues that those decisions should be distinguished from this case because the claimant herein was terminated for cause and, in essence, voluntarily quit his employment with respondent. Claimant disputes that the job was appropriate and further argues that claimant was unable to perform the unaccommodated employment. The Board finds that claimant was unable to perform the unaccommodated job with respondent and was in need of permanent work restrictions. He attempted to return to work for respondent in April 2010, but the work made his condition more symptomatic and he could not endure the pain. Claimant did not act in bad faith in refusing that work. Nevertheless, the Board believes that the Kansas appellate courts have spoken on this good faith issue and, as such, the reasons for claimant's wage loss are not relevant to the determination of work disability under K.S.A. 44-510e. A wage will not be imputed to claimant. Likewise, claimant will not be limited to his percentage of functional impairment after he stopped working for respondent. The ALJ's finding that claimant thereafter had a 100 percent wage loss and is entitled to an award of permanent partial disability compensation based on work disability is affirmed. And except as specifically noted herein, the Board further agrees with and affirms the remaining findings and conclusions of the ALJ.

CONCLUSION

(1) Claimant sustained personal injury by accident on August 8, 2009, that arose out of and in the course of his employment with respondent.

---

[13] *Osborn v. U.S.D. 450*, 2010 WL 4977119, Kansas Court of Appeals unpublished opinion filed November 12, 2010 (No. 102,674).

[14] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[15] See also *Guzman v. Dold Foods, LLC.*, 2010 WL 1253714, Kansas Court of Appeals unpublished opinion filed March 26, 2010 (No. 102,139).

(2) As a direct consequence of his accident and injury, claimant suffered permanent disability, including a 7.5 percent impairment of function and a 45 percent task loss. Claimant had no rateable preexisting impairment of function. He was not working under any restrictions at the time of his accident on August 8, 2009.

(3) Claimant need not prove a nexus between his wage loss and his work-related injury. Claimant's actual wage loss was 100 percent beginning when he was terminated by respondent.

(4) Claimant's injury and disability are directly attributable to his accident at work on August 8, 2009. It was not a direct and natural consequence of a prior injury or preexisting condition.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated November 22, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge